Lim Yik Ying v Liang Yung Piao & Anor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO A–05–20 OF 1999
LAMIN PCA, HAIDAR JCA AND MOHD NOOR AHMAD J
29 OCTOBER 1999

Civil Procedure *— Affidavit — Filed pursuant to s 365(i)(b) of Criminal Procedure Code — Whether conflict of facts in affidavits of both parties can be resolved by resorting to O 38 r 2(3) of Rules of the High Court 1980*

Family Law *— Children — Custody of children — Order for custody of child given to appellant — Appellant applied for direction that child be set at liberty from custody of respondents — Whether proper to dismiss application in view of conflicting facts disclosed in affidavits of both parties*

The appellant filed a notice of motion in the High Court at Taiping on 18 November 1998 pursuant to s 365(i)(b) of the Criminal Procedure Code for a direction that her daughter be set at liberty from the custody of the respondents. The learned judge dismissed the application primarily on the ground that the appellant should have proceeded by way of a civil action under the Guardianship of Infant Act 1961 ('the Act') in view of the conflicting facts disclosed in the affidavits of both parties. Before this, the learned judge had given a custody order ('the custody order') of the child to the appellant on 21 July 1998. The appellant appealed.

Held, allowing the appeal:

The learned judge should have given due consideration to the said custody order that he himself made and its effect thereof, vis-a-vis, the respondents. The issue of conflicting facts in the affidavits of both parties are of no importance in the face of the said custody order issued by the same court and remained valid and not set aside by the respondents. The legal custody of the child is and should be with the appellant (see p 210H–I).

Obiter:

The difficulties encountered by the learned judge on the conflict of facts in the affidavits of both parties can be resolved by resorting to O 38 r 2(3) of the Rules of the High Court 1980. The burden of proving lawful justification is on the respondents. It is for the respondents to urge the court to invoke its discretionary power under O 38 r 2(3) and apply to the court for cross-examination of the appellant on her affidavits where the facts deposed therein are disputed. The appellant may likewise do the same. However, both parties failed to do so (see p 209A–C).

[Bahasa Malaysia summary

Pemohon telah memfailkan satu notis usul di Mahkamah Tinggi di Taiping pada 18 November 1998 menurut s 365(i)(b) Kanun Prosedur Jenayah untuk satu arahan bahawa anak perempuan beliau dibebaskan daripada jagaan responden-responden. Hakim yang arif menolak permohonan tersebut pada mulanya atas alasan bahawa perayu sepatutnya memulakan tindakan melalui tindakan sivil di bawah Akta Penjagaan Anak-Anak 1961 ('Akta tersebut') memandangkan fakta-fakta yang bercanggah yang telah didedahkan di dalam afidavit-afidavit kedua-dua pihak. Sebelum ini, hakim yang arif telah memberikan perintah penjagaan ('perintah penjagaan tersebut') kanak-kanak tersebut kepada perayu pada 21 Julai 1998. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan tersebut:

Hakim yang arif sepatutnya telah memberi pertimbangan sewajarnya kepada perintah penjagaan tersebut yang telah dibuat oleh beliau sendiri vis-a-vis responden-responden. Isu di dalam fakta-fakta yang bercanggah di dalam afidavit-afidavit kedua-dua pihak tidak penting di dalam hal perintah penjagaan tersebut yang dikeluarkan oleh mahkamah yang sama dan kekal sah dan tidak diketepikan oleh responden-responden. Penjagaan menurut undang-undang kanak-kanak tersebut adalah dan sepatutnya pada perayu (lihat ms 210H–I).

Obiter:

Kesukaran-kesukaran yang dihadapi oleh hakim yang arif tentang fakta-fakta bercanggah di dalam afidavit-afidavit kedua-dua pihak tersebut boleh diselesaikan melalui A 38 k 2(3) Kaedah-Kaedah Mahkamah Tinggi 1980. Beban untuk membuktikan bidang kuasa yang sah adalah atas responden-responden. Adalah bagi responden-responden untuk menggesa mahkamah untuk menggunakan kuasa budi bicaranya di bawah A 38 k 2(3) dan memohon kepada mahkamah untuk memeriksa-balas perayu tentang afidavit-afidavit beliau di mana fakta-fakta yang dideposkan di sini telah dipertikaikan. Perayu juga boleh berbuat sedemikian. Walau bagaimanapun, kedua-dua pihak telah gagal untuk berbuat demikian (lihat ms 209A–C)]

Notes

For cases on affidavit generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

For cases on custody of children, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1766–1832.

Cases referred to

Gomez v Gomez [1969] 1 MLJ 228 (refd)

Nor Kursiah bte Baharuddin v Shahril bin Lamin & Anor [1997] 1 MLJ 537 (refd)

A *Yeap Hock Seng v Minister of Home Affairs Malaysia* [1975] 2 MLJ 279 (refd)
Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 (refd)

B **Legislation referred to**

Criminal Procedure Code (FMS Cap 6) ss 365(i)(b), 366
Guardianship of Infants Act 1961 ss 5, 10
Rules of the High Court 1980 O 38 r 2(3)

C *Ebenezer Ramesh* (*Ebenezer & Co*) for rhe appellant.
A Xavier (*Xavier Ravi Yunus & Yeoh*) for the respondents.

Haidar JCA (delivering judgment of the court): Lim Yik Ying, the appellant (applicant in the court below) filed a notice of motion in the High Court at Taiping on 18 November 1998 pursuant to s 365(i)(b) of the
D Criminal Procedure Code (FMS Cap 6) ('CPC') for a direction that her daughter, Chan Mei Leng ('the child') be set at liberty from the custody of the respondents. Section 365(i)(b) reads:

> The High Court may whenever it thinks fit direct:
>
> (i) that any person who
>
> E (a) ...
>
> (b) is alleged to be illegally or improperly detained in public or private custody within the limits of the Federation,
>
> (ii) ... be set at liberty; ... .

The direction is in the nature of a habeas corpus under Chapter XXXVI of
F the CPC.

As is provided by s 366 of the CPC, the form of the application shall be supported by affidavit. Hence, the notice of motion is therefore supported by the affidavit of the appellant. However, the respondents opposed the application and they filed a joint affidavit to that effect. The appellant in turn filed another affidavit in reply to the joint affidavit of the respondents.
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The learned judge dismissed the application with liberty to the appellant to file a civil action for custody of the child. Hence the appeal before us.

We allowed the appeal and set aside the order of the learned judge. We ordered that the child be set at liberty to the appellant. We now proceed to
H give our reasons.

We observe that the learned judge dismissed the application primarily on the ground that the appellant should have proceeded by way of a civil action under the Guardianship of Infants Act 1961 ('the Act') in view of the conflicting facts disclosed in the affidavits of both parties. In the
I circumstances, the learned judge was of the view that it would be difficult for him to decide on the issue of the custody of the child. According to the learned judge, he had to consider:

(a) the background of the appellant that is, nature of her work, her abode, her family relationship and her ability to bring up the child in the child's best interests; A

(b) the established relationship between the respondents and the child from the day they took care and brought her up when the child was left with them by her parents; and B

(c) the wishes of the child, that is, whether she would prefer to stay with the appellant or the respondents, taking into consideration that she is capable of making up her own mind as to what she feels best in her own interests.

On the other hand, it would appear that the learned judge had earlier on at the start of the proceedings considered and ruled on the issue of what would be the proper procedure for the appellant to proceed in this matter. Counsel for the respondents raised the procedural issue by way of a preliminary objection (see p 65 of the appeal record). According to counsel for the respondents the application by way of a writ of habeas corpus was not proper and it should be under the provisions of the Act. The learned judge ruled that though there is an alternative remedy to proceed under the Act, it did not bar the appellant to proceed by way of a writ of habeas corpus. As *Chaudhary's Law of Writs* (4th Ed 1992) at p 325 state: C D

> (2) Illegal custody — A parent, guardian or other person, who is legally entitled to the custody of a child can regain such custody when wrongfully deprived of it by means of habeas corpus. E

Further, Abdoolcader J, in *Yeap Hock Seng v Minister of Home Affairs Malaysia* [1975] 2 MLJ 279 in considering the alternative remedy issue stated at p 282 thus: F

> In the recent English Court of Appeal decision in *Regina v Governor of Pentonville Prison, ex p Azam* (at pp 24–49), which was affirmed by the House of Lords *sub nomine Azam v Secretary of State for the Home Department* (at pp 58–75), the Court of Appeal unanimously held that a person is entitled to seek a writ of *habeas corpus* as of right and is not obliged to rely on the less convenient remedy of appeal or any other alternative remedy provided by statute. Although in that case the illegal entrant would only have been in a position to appeal after he had been removed from the United Kingdom and presumably after he had got back to his homeland, that does not, in my view, detract from the principle laid down by Lord Denning MR and Buckley and Stephenson LJJ, to the effect that the existence of an alternative remedy, however convenient, beneficial and effectual, does not prevent the issue of a writ of habeas corpus and that it is open to the court notwithstanding to examine the legality of the impunged detention. G H

The learned judge ruled that he had the jurisdiction to hear the application on its merits as to whether the child was illegally or improperly detained by the respondents. With respect, the decision of the learned judge can properly be described as 'making an about turn' when at the end of the proceedings he dismissed the application and allowed the appellant the liberty to file a civil action under the Act in respect of the custody matter I

without hearing the merits of the appellant's application. As stated earlier, this was because of the conflicting facts in the affidavits of both parties.

Be that as it may, while we appreciate the difficulties encountered by the learned judge on the conflict of facts in the affidavits of both parties, the matter can be resolved by resorting to O 38 r 2(3) of the Rules of the High Court 1980. The burden of proving lawful justification is on the respondents (see *Yeap Hock Seng v Minister of Home Affairs Malaysia* at p 282). It is then for the respondents to urge the court to invoke its discretionary power under O 38 r 2(3) and apply to the court for cross-examination of the appellant on her affidavits where the facts deposed therein are disputed (see *Gomez v Gomez* [1969] 1 MLJ 228). The appellant may likewise do the same. However both parties failed to do so. After all s 366 of the CPC provides for affidavit evidence for such an application.

Notwithstanding whatever conflicting facts in the affidavits of both parties, in our view, the more important issue that should have been considered by the learned judge is the order of the court dated 21 July 1998 giving legal custody of the child to the appellant (p 35 of the appeal record). It is merely a legal issue. Unfortunately he failed to so consider. Apparently the said custody order was given by the same learned judge. It is not disputed that in the Originating Summons No 24–23–97(T) ('originating summons') filed by the appellant, as the plaintiff, to get the custody order of the child, the respondents were not made as parties but instead the husband of the appellant was made a party. In our view, the originating summons filed under the provisions of the Act citing the appellant's husband as the defendant was correctly taken by her. This is by virtue of s 5 of the Act where the father of the infant is the guardian. Section 5 reads:

> Subject to s 10, the father of an infant shall be the guardian of the infant's person and property:
>
> Provided that the Court or a judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent.

The appellant's husband did not appear and contest the originating summons though served by way of substituted service. Neither did her husband thereafter try to set it aside.

In the said custody order of 21 July 1998 itself it is clearly stated that the child was in the custody of a third party (see p 36 of the appeal record). The child at the time of the said custody order was 8 years old (see copy of her birth certificate at p 17 of the appeal record). The learned judge could have very well invoked his power under s 12 of the Act and ordered for the production of the child by the third party, that is, the respondents.

Though the learned judge did not consider the said custody order that was before him and merely decided on the procedural issue, it did not relieve this Court of its duty to consider this issue. It is purely a legal issue and there would be no necessity to remit this case for the learned judge to decide. In any event neither side has argued in favour of such a course of

action (see *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9). A

In view of the said custody order issued by the same court giving legal custody to the appellant it is not open to the respondents in the habeas corpus application to challenge the validity of the said custody order (*Nor Kursiah bte Baharuddin v Shahril bin Lamin & Anor* [1997] 1 MLJ 537). It B is to be noted that the said custody order was served on the respondents vide the appellant's solicitor's letter dated 25 September 1998 and though admitted by the respondents, they contended that the service of the said custody order on them was wrong and improper as they were not made parties to the originating summons. Hence, the respondents contended that they need not comply with it (see letter in reply of the respondents' solicitors C dated 7 October 1998 at p 39 of the appeal record).

It may be true that the respondents were not cited as parties to the originating summons but if the respondents were serious in asserting their legal rights to the custody of the child they should take steps to intervene in the originating summons and set aside the said custody order made by the D court. This, they could do by virtue of s 10 of the Act which reads:

> The Court or a judge may at any time remove from his guardianship any guardian, *whether a parent or otherwise* and whether of the person or the property of the infant, and may appoint from time to time another person to be guardian in his place. (Emphasis added.) E

This they failed to do. Neither did they take steps to adopt the child if they honestly believe that the parents (including the appellant) abandoned the child, if at all. Instead they were more interested in getting paid for taking care and maintaining the child as apparently the parents of the child fell in arrears for the expenses for the maintenance of the child from 1993. It is F then a matter for the respondents to sue the appellant and her husband for the arrears. Instead it would appear that the respondents were holding the child for ransom. This is what the respondents' solicitors said in their letter dated 10 October 1998 (p 40 of the appeal record).

> Our clients are willing to surrender the child if both parents were to request as G both parents then left the child in the care of our clients. *This will be subject to the parents either jointly or severely paying all expenses for the child now in arrears from 1993.* ...
>
> In view of the above, our clients will not surrender the child to your client under the said order. Please do not attempt to remove the child from the custody of our clients. (Emphasis added.) H

In our view, the learned judge erred in the order that he made. He should have given due consideration to the said custody order that he himself made and its effect thereof, vis-a-vis, the respondents. The issue of conflicting facts in the affidavits of both parties really are of no importance in the face of the said custody order issued by the same court and remained valid and I not set aside by the respondents. Therefore, prima facie, the legal custody of the child is and should be with the appellant.

A In the circumstances, the order of the learned judge was set aside. We ordered that the child should be set at liberty to the appellant.

Postscript

Counsel for the respondents intimated to us that he had the instructions of
B his clients to appeal against our order to the Federal Court and asked for a stay of our order. We directed the counsel to file a formal application. In the interim we left to the parties to work out some form of arrangement for the purpose of giving effect to our order until the appeal is heard by the Federal Court. A check with the court's registry showed that no formal application for stay of our order has been filed by the respondents.

C We are conscious of the fact that the child may face some difficulties in adjusting to the change of custody from the respondents to the appellant as she had been with the respondents from one month old up to now. We hope some arrangements can be worked out by both parties so as not to upset the child in adjusting to her new environment in the custody of the appellant
D like for example reasonable access to the child be given to the respondents by the appellant until such time as she has adjusted well with the appellant, her natural mother, all in the best interests of the child.

Appeal allowed.

E Reported by Benjamin Yong

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